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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

L.A. PRINTEX INDUSTRIES, INC., a California Corporation,

Plaintiff,

vs.

LE CHÂTEAU, INC., a Canadian Corporation; and DOES 1-10,

Defendants.

CASE NO. CV10 4264-ODW (FMOx)

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT;

DECLARATIONS OF DAVID W. QUINTO AND ERIC POULIN; STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW; AND [PROPOSED] ORDER FILED CONTEMPORANEOUSLY HEREWITH

Date: February 14, 2011
Time: 1:30 p.m.
Crtrm.: 11
Judge: Honorable Otis D. Wright II

TO PLAINTIFF AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on February 14, 2011, at 1:30 p.m., defendant Le Château, Inc. will, and hereby does, move the Court pursuant to Fed. R. Civ. P. 56 for an order granting summary judgment.

This motion is made on the ground that the undisputed evidence is that Le Château, Inc. did not commit any act of copyright infringement actionable under the

laws of the United States and on the further ground that the assertion of personal jurisdiction and venue as to Le Château, Inc. is improper.

This motion is based on this notice; the accompanying Memorandum of Points and Authorities; the Separate Statement of Undisputed Facts and Conclusions of Law; the Declarations of David W. Quinto and Eric Poulin; any matters of which this Court may take judicial notice; and any additional argument and evidence as may be presented at the hearing of this matter.

Statement of Rule 7-3 Compliance

Plaintiff's Refusal to Meet and Confer. As set forth more fully in the attached Declaration of David W. Quinto dated January 11, 2011, plaintiff was placed on notice of Le Château's contentions pursuant to a letter to plaintiff's counsel, Scott Alan Burroughs, sent July 28, 2010. The facts relied on in this motion were set forth in a declaration of Eric Poulin dated and provided to plaintiff on September 28, 2010. Mr. Poulin's declaration was further incorporated *in haec verba* into the Parties' Rule 26(f) Joint Report dated September 28, 2010.

By e-mail message dated November 22, 2010, sent to Mr. Burroughs and his partner, Stephen M. Doniger, counsel for Le Château requested to meet and confer concerning summary judgment. On November 24, 2010, Mr. Burroughs rejected that request as not a "proper 7-3 notice setting forth in full the bases for your proposed motion." On November 25, 2010, Le Château provided Messrs. Burroughs and Doniger with a more fulsome explanation of the bases of this motion. On November 30, 2010, Mr. Burroughs responded: "Can you further explain your position so that we can consult with the client regarding your proposed motion?" By letter dated November 30, 2010, Le Château provided Mr. Burroughs with a further explanation of the intended bases of its motion and further disclosed that it also intended to seek Rule 11 sanctions.

For two weeks, there was no response. Then, on December 14, 2010, Mr. Burroughs stated that he was "available to meet and confer on Friday

[December 17] of this week." Le Château's counsel accepted that offer, agreeing to meet on December 17, as requested. However, Mr. Burroughs immediately responded that he would be "in deposition on Friday" and added, "I can't justify billing partner-level rates on this small matter." Le Château's counsel immediately responded that, "If that doesn't work, I'll be available after January 2." Mr. Burroughs' response was to accuse Le Château of refusing to meet and confer. Thereafter, plaintiff's counsel expressed no further interest in meeting and conferring.

DATED: January 11, 2011

QUINN EMANUEL URQUHART & SULLIVAN, LLP

By _____
David W. Quinto
Attorneys for Defendant
Le Château, Inc.

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MEMORANDUM OF POINTS AND AUTHORITIES

Preliminary Statement

Plaintiff's baseless action was quite clearly brought solely to gain leverage in a prior action pending in Canada. Le Château learned of plaintiff's existence on or about August 25, 2008, when it received a letter from plaintiff's counsel, Scott Alan Burroughs, sent to it in Canada. That letter accused Le Château of infringing the copyright in issue in this case. On or about July 13, 2009, plaintiff sued Le Château in Canada alleging that it had infringed the design in suit herein. On April 30, 2010, plaintiff deposed Eric Poulin, Le Château's Director of International Development, in Montréal, Canada in the course of the Canadian litigation. Mr. Poulin was examined at length concerning the pattern in suit here and disclosed that 77 garments printed with the alleged pattern had been sold in the U.S. As plaintiff well knows, all 77 were sold by two New York stores owned by an affiliate of Le Château, and none was sold in California.

Notwithstanding that it knew of no basis to sue Le Château in the United States, much less in California, plaintiff nonetheless filed this suit on June 10, 2010 – one of hundreds of similar suits plaintiff has filed in this district over the past several years – seeking damages, costs and attorneys' fees related to the sale of 77 garments in New York. Plaintiff then ignored a July 28, 2010 letter from Le Château's attorneys setting forth facts showing that Le Château is not subject to jurisdiction or venue here. It also ignored Mr. Poulin's September 28, 2010 declaration – repeated verbatim in the Parties' Rule 26(f) Joint Report dated September 28, 2010 – setting forth facts showing that Le Château had not committed any act of infringement under U.S. copyright laws and that it could not be subject to personal jurisdiction or venue in California. As reflected in the parties' Rule 26(f) Joint Report, plaintiff's counsel conceded that plaintiff's *sole* basis for filing suit here was that plaintiff's counsel were "imagining" that some act of

infringement "must have occurred here because plaintiff is located here." Joint Report at 3:6-8 (emphasis added).

Because the sole evidence is that any copying or reproduction of the pattern in suit occurred in Canada and that the only 77 sales in the United States were made by a non-party, Le Château is entitled to summary adjudication of the copyright claims. Further, because Le Château is a Canadian corporation that conducts no business in California and had no contact with California in connection with the events giving rise to plaintiff's complaint, Le Château is entitled to dismissal for lack of personal jurisdiction, as well as well as an award of its costs and fees.

Statement of Facts

Le Château is a Canadian corporation having its principal place of business in Montréal, Quebec, Canada. It sells garments in Canada through its 226 retail stores located in Canada. An affiliate, Château Stores, has two stores located in the State of New York that also sell garments. Neither Le Château nor the New York affiliate has ever (i) operated a retail store in California; (ii) owned any business registered in California; (iii) obtained any type of license or permit from the State of California; (iv) maintained a bank account in California; (v) had an agent for service of process in California; (vi) filed a lawsuit or, before now, been sued in California; (vii) had employees based in California; (viii) engaged or employed representatives or agents in California; (ix) owned property in California; (x) advertised in California; (xi) maintained a website that solicited or accepted purchase from California residents; or (xii) shipped goods to California.[1]

Le Château either purchases from third-party suppliers the garments it and Château Stores sell or manufactures them itself. When Le Château purchases fabric, it typically does so either by acquiring a fabric design from a designer or by

[1] Declaration of Eric Poulin dated January 11, 2011 ("Poulin Dec."), ¶ 8.

acquiring fabric from a fabric printing mill. Le Château has attempted to ascertain how it acquired the pattern at issue in this action. As best it can determine, it acquired the pattern in fall 2006. At that time, it had never heard of plaintiff L.A. Printex Industries. Following its internal investigation, Le Château concluded that it likely acquired the pattern in suit by purchasing the design in Canada, as opposed to purchasing fabric imprinted with the design.[2]

After acquiring the design, Le Château engaged another Canadian company, Canstar, to print fabric bearing the design. 77 garments with the pattern in suit were subsequently sold by Château Stores in New York. No garments with the pattern in suit were sold in California and no garments bearing the pattern in suit were sold anywhere in the U.S. by Le Château.[3]

In August 2008, Le Château learned of plaintiff's existence when it received a cease and desist letter sent by its attorney, Scott Alan Burroughs. That letter accused Le Château of infringing a U.S. copyright registration that plaintiff purportedly owns in the copyright in suit. On or about July 13, 2009, plaintiff sued Le Château in Federal Court in Montréal, Canada. That suit alleged that Le Château had infringed plaintiff's purported copyright in the pattern now in suit in this action. On April 30, 2010, Mr. Poulin was deposed by L.A. Printex in the Canadian action. During that deposition, he disclosed that 77 garments printed with the pattern in suit have been sold in New York.[4]

Thereafter, on June 10, 2010, plaintiff initiated this action against Le Château. By letter dated July 28, 2010, Le Château advised plaintiff's attorneys, Stephen M. Doniger and Scott Burroughs, that it does not have any stores in California; never obtained any license or permit from the State of California; never maintained a bank

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[2] Id., ¶¶ 10-11.
[3] Id., ¶ 11.
[4] Id., ¶¶ 4-5.

account in the State of California; never had an agent for service of process in the State of California; never filed suit in the State of California; has never before been sued in the State of California; has never had an employee based in the State of California; has never had a representative or agent based in the State of California; has never owned any property in the State of California; has never advertised in the State of California; has never maintained any web site that solicited or accepted orders from residents of the State of California; and, at least for the past five years, has never shipped goods to anyone within the State of California. Accordingly, it asked that plaintiff dismiss the action against it.[5]

Because plaintiff refused to dismiss this action, Le Château was forced on August 23, 2010, to answer the Complaint. The preliminary statement to Le Château's Answer recited that:

> This action concerns the sale of just 77 garments by defendant's New York subsidiary, resulting in a profit to the subsidiary of less than $500. Neither Defendant nor its subsidiary transact business in California, sell garments to Californians, advertise in California, solicit business in California, or maintain any business presence in California.[6]

Because plaintiff continued to prosecute the action, Le Château conducted an early meeting of counsel on September 28, 2010, with plaintiff's counsel, who candidly admitted that, notwithstanding plaintiff's allegations to the contrary in its complaint, plaintiff is unaware of any facts showing that Le Château (i) is subject to jurisdiction in California; (ii) is subject to venue in California, or (iii) has ever

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[5] Declaration of David W. Quinto dated January 11, 2011 ("Quinto Dec."), ¶ 5 and Exhibit D thereto.

[6] Id., ¶ 3 and Exhibit B thereto.

transacted business in the United States. Plaintiff's counsel explained that plaintiff's *sole* basis for filing suit in California is that plaintiff's counsel were "imagining" that some act of infringement "*might* have occurred here because plaintiff is located here." That admission is reflected in the parties' Rule 26(f) Joint Report. Plaintiff's counsel additionally refused to state whether she believed that plaintiff's counsel had met their ethical obligations under Fed. R. Civ. P. 11 in filing suit.[7]

Le Château then provided plaintiff's counsel with a declaration signed under penalty of perjury by Eric Poulin, Le Château's Director of International Development, confirming that Le Château's only two affiliated stores in the United States are in New York and are owned by Château Stores, Inc. Mr. Poulin's declaration further confirmed that Le Château evidently acquired the pattern in suit in Canada in 2006 and that the garments in suit were printed by a Canadian company named Canstar. Finally, Mr. Poulin noted that Le Château has never done business with plaintiff and, indeed, was entirely unaware of plaintiff's existence before receiving a cease and desist letter from plaintiff in Canada. In addition to providing a signed copy of Mr. Poulin's declaration to plaintiff's counsel, Le Château also included it in the parties' Rule 26(f) Joint Report.[8]

Thereafter, plaintiff continued to prosecute the action in bad faith. It demanded a settlement payment many times greater than the *total* profits earned by non-party Château Stores, Inc. and, in addition, demanded relief to which it would not be entitled even in the highly unlikely event it prevailed at trial. Accordingly, Le Château has been forced to seek summary judgment (and will seek Rule 11 sanctions).[9]

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[7] Id., ¶ 4 and Exhibit C thereto.
[8] Id., ¶ 4 and Exhibit C thereto.
[9] Id., ¶ 9.

Even after notifying plaintiff's counsel that Le Château had no alternative but to ask the Court for relief, plaintiff and its counsel continue to act in bad faith. On November 22, 2010, Le Château asked plaintiff's counsel to meet and confer concerning a summary judgment motion. However, plaintiff's attorneys rejected that request, noting that they "do not believe you are acting in good faith, or in the best interests of your client; but, so be it."[10]

On November 25, 2010, Le Château's counsel again requested to meet and confer concerning summary judgment, explaining that Le Château had not committed any act of infringement actionable under U.S. copyright laws and is not subject to jurisdiction or venue in California. On November 30, plaintiff's counsel once again refused to meet and confer, writing that they "fail to see how your client did not commit any acts of copyright infringement" and further asking that Le Château "explain [its] position."[11]

On November 30, 2010, Le Château's counsel again wrote to plaintiff's counsel advising that, in addition to seeking an award of costs and fees under the Copyright Act, it would also seek an award of fees pursuant to Fed. R. Civ. P. 11. The letter additionally noted that because the Le Château is not subject to jurisdiction here, it is entitled to the entry of a judgment in its favor.[12]

Two weeks later, on December 14, 2010, plaintiff's counsel responded by stating that they were "available to meet and confer on Friday [December 17] of this week."[13]

Le Château's counsel wrote back, affirming that Le Château "would be happy to try to resolve this without the need for a motion, if possible." Le Château's

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[10] Id., ¶ 8 and Exhibit F thereto.
[11] Id., ¶¶ 9-10 and Exhibits G and H thereto.
[12] Id., ¶ 11 and Exhibit I thereto.
[13] Id., ¶ 12 and Exhibit J thereto.

counsel then accepted the offer to meet and confer on Friday, December 17. But when he did so, however, plaintiff's counsel immediately retracted his agreement to meet and confer:

> I'm in deposition on Friday, and have new client meetings stacked all afternoon. Plus, I can't justify billing partner-level rates on this small matter. Please call Regina of my office on Friday to discuss.[14]

Le Château's counsel wrote back, noting that:

> You asked to meet and confer Friday. If that doesn't work, I'll be available after January 2. You or she are welcome to meet with me immediately after that, before we file.[15]

The response of plaintiff's counsel was an unequivocal refusal to meet and confer:

> Let this confirm that your office has decided not to meet and confer as required by L.R. 7-3 in regard to its proposed motion.[16]

Le Château then responded that the case was "quite the opposite" but plaintiff never agreed to meet and confer.[17]

Accordingly, plaintiff has no choice but to ask the Court to dismiss a baseless action that was brought without *any* pre-filing investigation and that has since been maintained in bad faith.

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[14] Id., ¶¶ 13-14 and Exhibit K and L thereto.
[15] Id., ¶ 15 and Exhibit M thereto.
[16] Id., ¶ 16_ and Exhibit N thereto.
[17] Id., ¶ 17 and Exhibit O thereto.

Argument

I. SUMMARY JUDGMENT STANDARD

Summary judgment is "properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548, 2555 (1986) (quoting *Fed. R. Civ. P.* 1). Summary judgment should be entered when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P.* 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

Under *Celotex*, Le Château need not negate plaintiff's claims if it can show that plaintiff cannot meet its burden to prove them. Pursuant to Rule 56, "a moving defendant may shift the burden of producing evidence to the nonmoving plaintiff merely by 'showing' — that is, pointing out through argument — the absence of evidence to support plaintiff's claim." *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 532 (9th Cir. 2000). Moreover, if the factual context makes the non-moving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). No longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment. *California Architectural Building Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987).

II. THE COMPLAINT HEREIN SHOULD BE DISMISSED BECAUSE THE COURT LACKS SUBJECT MATTER JURISDICTION

This Court would have subject matter jurisdiction over plaintiff's copyright claims only if those claims arose under the U.S. Copyright Act. *See* 28 U.S.C. § 1338(a). An action "arises under" the Copyright Act "if and only if the complaint is for a remedy expressly granted by the Act." *See Royalty Control Corp. v. Sanco,*

Inc., 175 U.S.P.Q. 641, 642 (N.D. Cal. 1972). The Copyright Act is territorial; rights under it extend no farther than the borders of the United States. *See, e.g., Filmvideo Releasing Corp. v. Hastings*, 668 F.2d 91, 93 (2d Cir. 1981); *Robert Stigwood Group v. O'Reilly*, 530 F.2d 1096, 1101 (2d Cir. 1976).

Here, the sole evidence is that Le Château did not commit any act of copyright infringement in the United States. Apart from the fact that Le Château denies it has infringed any of plaintiff's alleged copyrights anywhere or at any time, it is undisputed that Le Château had never even heard of plaintiff until it received plaintiff's cease and desist letter. It is also undisputed that Le Château did not obtain the pattern and suit from plaintiff. Instead, it appears that Le Château obtained the pattern and suit from a third party in Canada and then authorized another Canadian company having a manufacturing facility in China to make the garments in suit. Although 77 garments printed with the pattern in which plaintiff claims copyright protection were sold in the United States, they were not sold by Le Château. Rather, they were sold by a corporate affiliate of Le Château. Le Château did not, itself, sell any of the challenged garments to anyone in the United States.

Accordingly, Le Château has not engaged in any conduct in the United States that could give rise to liability under U.S. copyright laws, even if plaintiff could prove that it is the owner of the copyright in suit and that the 77 garments sold in New York were infringing. For that reason, alone, Le Château is entitled to the entry of judgment in its favor.

III. THE COURT ALSO LACKS PERSONAL JURISDICTION OVER LE CHÂTEAU

The plaintiff always has the burden to establish personal jurisdiction. *See, e.g., Ziegler v. Indian River County*, 64 F.3d 470, 473 (9th Cir. 1995). California's long-arm statute authorizes California courts to exercise personal jurisdiction to the full extent of due process. *Cal. Civ. Proc. Code* § 410.10. Personal jurisdiction over a non-resident defendant depends upon the existence of two criteria: (1) valid

service of process; and (2) the existence of minimum contacts between the defendant and the forum state. *See Ziller Electronics Lab GmbH v. Superior Court*, 206 Cal. App. 3d 1222, 1224, 254 Cal. Rptr. 410, 413 (1988). As shown above, there has not been valid service of process. As shown below, the minimum contacts requirement is also not satisfied.

California's long-arm statute provides that jurisdiction may be exercised "on any basis not inconsistent with the Constitution of this state or of the United States." *Cal. Civ. Proc. Code* § 410.10. Due process under the U.S. Constitution requires that a non-resident defendant have "minimum contacts" with a forum state so that maintaining a suit against the defendant does not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). In other words, the "defendant's conduct and connection with the forum State [must be] such that [it] should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559 (1980).

There are two types of personal jurisdiction: specific and general. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 nn. 8-9 (1984). General jurisdiction may be exercised if a non-resident defendant's activities are "substantial or continuous and systematic," even if the claims are unrelated to those activities. *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir. 1990).

Here, general jurisdiction obviously does not apply because Le Château has no "substantial or continuous and systematic" contact with California. It does not have any offices, agents or employees here and does not transact business here.[18]

Nor is Le Château subject to specific jurisdiction. The exercise of specific jurisdiction requires that the "non-resident defendant must purposefully direct his

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[18] Poulin Dec., ¶ 8.

activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; the claim must be one which arises out of or relates to the defendant's forum-related activities; [and] the exercise of jurisdiction must comport with fair play and substantial justice." *Reebok International Ltd. v. McLaughlin*, 49 F.3d 1387, 1391 (9th Cir. 1995). Because Le Château has not engaged in any activity in, or had any contact with, California giving rise to plaintiff's claim, jurisdiction is lacking.

The action should therefore be dismissed because Le Château is not subject to either general or specific jurisdiction.

IV. LE CHÂTEAU SHOULD BE AWARDED ITS COSTS AND ATTORNEYS' FEES

Section 505 of the Copyright Act provides that "the court in its discretion may allow the recovery of full costs by or against any party." Further, "the court may award a reasonable attorney's fee to the prevailing party as part of the cost."

In *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994), the Supreme Court held that in exercising its discretion to award attorney's fees to prevailing copyright plaintiffs or defendants, courts should take an "even-handed" approach that treats both sides equally. The Supreme Court approvingly cited one circuit court's consideration, as nonexclusive factors, of the losing party's "frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence." Id. at 534, n.19, citing *Lieb v. Topstone Industries, Inc.*, 788 F.2d 151, 156 (3d Cir. 1986).

Here, plaintiff has clearly pursued a frivolous, objectively unreasonable suit for an improper motivation. It has long known that Le Château is not subject to jurisdiction or venue in California. It has also long known that Le Château has not

committed any act of copyright infringement in the United States. It had no reason to conclude that because an affiliate had sold 77 garments in New York, the parent could be subject to liability in California. Moreover, plaintiff's counsel candidly admitted that plaintiff conducted *no* pre-litigation investigation. In plaintiff's counsel's own words, counsel were simply "imagining" that some act of infringement "might have occurred here because plaintiff is located here."[19] But even if plaintiff had not asked in such manner, an award of attorney's fees would be appropriate. Indeed, the 9th Circuit affirmed an award of $1,374,519 made to a prevailing defendant in an action in which the plaintiff was *not* blameworthy. *See Fantasy, Inc. v. Fogerty*, 94 F.3d 553, 555 (9th Cir. 1996).

Because an evidentiary hearing is ordinarily required to determine the amount of any attorney's fee award, *see Crescent Publishing Group v. Playboy Enterprises, Inc.*, 246 F.3d 142, 147 (2d Cir. 2001), Le Château respectfully requests that the Court award it attorney's fees in an amount to be determined upon further briefing.

Conclusion

For the reasons set forth above, Le Château respectfully requests that its motion be granted in all respects.

DATED: January 11, 2011

QUINN EMANUEL URQUHART & SULLIVAN, LLP

By _____
David W. Quinto
Attorneys for Defendant
Le Château, Inc.

[19] Quinto Dec., ¶ 4.